No. 98-97

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

ELOISE ANDERSON, Director, California Department of Social Services; CALIFORNIA DEPARTMENT OF SOCIAL SERVICES; PETE WILSON, Governor of the State of California; and CRAIG L. BROWN, Director, California Department of Finance,

Petitioners,

v.

BRENDA ROE and ANNA DOE, on behalf of themselves and all others similarly situated,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY-COUNTY MANAGEMENT ASSOCIATION, U.S. CONFERENCE OF MAYORS, AND NATIONAL LEAGUE OF CITIES AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether California's rule limiting new residents to the TANF benefit level of their prior state of residence for one year is constitutional.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials

throughout the United States.[1] *Amici* have a compelling interest in the issue presented in this case: whether California's rule limiting new residents to the TANF benefit level of their prior state of residence for twelve months is constitutional.

In response to the universally acknowledged failure of the Washington-centered AFDC program, Congress, in consultation with the States, undertook a revolutionary restructuring of the welfare system by enacting the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA). PRWORA purposely devolves power from the Federal Government to the States. Its success is predicated upon the ability of the States to engage in a large degree of innovation in their welfare programs, which virtually all States have already done.

In addition, a key feature of PRWORA is its express authorization to States to "apply to a family the rules (including benefit amounts) of the program . . . of another State if the family has moved to the State from the other State and has resided in the State for less than 12 months." 42 U.S.C. § 604(c). Pursuant to this authorization, California and thirteen other States have thus far adopted durational residency rules governing benefit levels. Both Congress and the legislatures of those fourteen

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief *amicus curiae*. Their letters of consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that this brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the *amici* or their members, made a monetary contribution to the preparation or submission of this brief.

States have concluded that such residency rules are necessary not only to protect States with higher benefit levels from attracting recipients from other States solely in order to receive higher benefits, but also to prevent States with more generous programs from being forced to reduce benefits and other programs because of limited state resources and capped federal funding under PRWORA's block grant formula.

Because of the importance of the issue presented to the ability of the States to devise and implement successful welfare programs, *amici* submit this brief to assist the Court in the resolution of this case.

STATEMENT

By 1996, a consensus had emerged that the Nation's "Washington-centered welfare regime" was a failure. *See, e.g.*, H.R. Rep. No. 651, 104th Cong., 2d Sess. 3-5 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2183, 2184-2186. The welfare system was viewed as "trap[ping] recipients in a cycle of dependency," "undermin[ing] the values of work and family that form the foundation of America's communities," and "fail[ing] the Nation's children." *Id.* at 3, 1996 U.S.C.C.A.N. at 2184. While all levels of government increased welfare spending "from $24.4 billion in 1960 to an estimated $397.1 billion in 1995," the poverty rate "held stubbornly at between 12 and 15 percent of the population" and "enrollment in Aid to Families With Dependent Children [AFDC], the principal welfare program, ha[d] increased fivefold." *Id.* at 3-4, 1996 U.S.C.C.A.N. at 2184-85. Moreover, by 1996, "illegitimacy ha[d] increased 400 percent, the number of single-parent families ha[d] increased 238 percent, and violent crime ha[d] risen 560 per-

cent." *Id.* at 4, 1996 U.S.C.C.A.N. at 2185. Research conducted for the Urban Institute showed that "90 percent of those currently receiving welfare will eventually spend more than 2 years on the rolls, and 76 percent will receive welfare for more than 5 years." *Id.*

The "greatest tragedy of the welfare system" was "how it harm[ed] the Nation's children," increasing illegitimacy and "breed[ing] a variety of . . . pathologies scarring children in ways that can affect their entire lives." *Id.* According to the National Health Interview Survey of Child Health, "children born out of wedlock have more emotional and behavioral problems than children in intact families." *Id.* Research done for the Department of Health and Human Services indicated "that children born out of wedlock are three times more likely to become dependent on welfare than are other children." H.R. Rep. No. 651 at 5, 1996 U.S.C.C.A.N. at 2186. A University of Michigan study found that "the receipt of welfare income has negative effects on young boys with respect to their long-term employment and earnings capacity." *Id.*

A. The Personal Responsibility And Work Opportunity Reconciliation Act Of 1996

In response to the failure of "the Washington-centered welfare regime," *id.*, Congress, in consultation with the States, undertook a revolutionary restructuring of the welfare system by enacting the Personal Responsibility And Work Opportunity Reconciliation Act Of 1996 (PRWORA), P.L. 104-193, 110 Stat. 2105. PRWORA significantly changed both the relationship between the States and Federal Government and that between welfare recipients and all levels of the government.

First, PRWORA marks a major devolution of power from the Federal Government to the States. The statute rejected the extant approach under which the States were required to seek waivers from the Department of Health and Human Services to implement welfare reform. *See* H.R. Rep. No. 651 at 3, 1996 U.S.C.C.A.N. at 2184 (characterizing it as "a system in which States must beg Washington for permission to innovate for the benefit of their populations"). Rather, PRWORA provides the States with block grants subject to reduced federal requirements. Congress took this approach, intending to grant the States "maximum . . . flexibility to show true compassion by helping those in need achieve the freedom of self-reliance," *id.*, and to "give[] States the freedom to innovate in developing income support programs for welfare families that encourage personal responsibility and move welfare recipients into the work force." H.R. Rep. No. 651 at 5, 1996 U.S.C.C.A.N. at 2186.

Second, PRWORA redefined the relationship between welfare recipients and the government in several critical ways. Under the statute, "welfare is, for the first time, converted to a work program." *Id.* PRWORA abolished the old AFDC program and its premise that welfare is an entitlement. *See* 42 U.S.C. § 601(b) (PRWORA "shall not be interpreted to entitle any individual or family to assistance under any State program funded under this part"). This decision has substantial consequences for both recipients and the States. Congress replaced AFDC with a new program, Temporary Assistance to Needy Families

(TANF). With respect to recipients, PRWORA prohibits the use of federal TANF funds to provide welfare recipients with more than five years of lifetime benefits and "requires one member of every family on welfare to be working within 2 years." H.R. Rep. No. 651 at 5. 1996 U.S.C.C.A.N. at 2186. States, however, are free to use their own funds to provide welfare assistance to recipients beyond the federal time limit.

In response to the increase in the illegitimacy rate, PRWORA authorizes "States to cap benefits for those on welfare, ending bonuses for families on welfare who have additional children they cannot support." *Id.* Furthermore, PRWORA grants States the option of contracting out welfare services to such nongovernmental entities as "charitable, religious, or private organizations." PRWORA § 104(a), 110 Stat. 2161, codified at 42 U.S.C. § 604a(a). Under PRWORA, States are not required to provide cash assistance but can provide recipients with vouchers that are redeemable only by a contractor. *See id.*

PRWORA's abolition of welfare as entitlement also has substantial consequences for the States. While PRWORA's block grant approach provides the States with significant flexibility in designing their welfare programs, Congress did not write the States a blank check. Rather, a State's share of the federal block grant is capped at a fixed funding level through fiscal year 2002 under a complex formula. *See* PRWORA § 103, 110 Stat. 2116-24.[2] The statute also

[2] As the House Report explains, each State is to "receive the highest of Federal payments to the State for AFDC benefits, AFDC administration, Emergency Assistance, and JOBS

creates a $2 billion contingency fund accessible to States which experience, within a three month period, a ten percent increase in their unemployment rate over the average rate for the preceding two years, or a similarly large increase in their food stamp caseload. *See* PRWORA § 103(b)(6), 110 Stat. 2123. Monthly payments from the contingency fund to an individual State, however, are limited to one sixtieth of its Family Assistance Grant (which a State must match in additional spending) and the fund is to cover fiscal years 1997 through 2001. *See id.* § (b)(3), 110 Stat. 2122. It is thus entirely possible that a State can exhaust its federal block grant funds in the event of an economic downturn. By abolishing the entitlement to welfare and capping federal spending, PRWORA thus shifts to the States most of the financial risks associated with increased case loads.

B. State Welfare Reforms

Having been granted greater flexibility to design effective welfare programs, the States have adopted various reforms. These reforms demonstrate that PRWORA has fundamentally changed the Nation's welfare system from the AFDC program in existence at the time of *Shapiro v. Thompson*, 394 U.S. 618 (1969).

Time Limits As of January 1998, thirty-five States had enacted lifetime benefit limits, most of which are set at 60 months. Jack Tweedie, *Building a Founda-*

for: (1) fiscal years 1992 through 1994, on average; (2) fiscal year 1994; or (3) fiscal year 1995; plus, under certain circumstances, 85 percent of increased fiscal year 1995 spending for emergency assistance." H.R. Rep. No. 651 at 1322, 1996 U.S.C.C.A.N. at 2381.

tion for Change in Welfare, State Legislatures, Jan. 1998, at 29 (hereinafter "*Building a Foundation*"). Six States have benefit limits shorter than five years and three other States have authorized their welfare agencies to set shorter limits. *Id.* Other States have enacted " 'periodic time limits' that end benefits after a certain period" (with some hardship exemptions) but allow recipients to "go back on the rolls after a certain period of time." *Id.* Some States apply their time limits only to the adult members of the family. *Id.* Most States have also enacted "conditional time limits," under which a recipient must meet certain conditions such as the performance of community service work or increase their cooperation with agency efforts to help them find a job in order to continue to receive benefits. *Id.* Among the States, there are substantial differences in exemption policy for the various categories of time limits. *See* L. Jerome Gallagher *et al.*, *One Year After Federal Welfare Reform: A Description of State Temporary Assistance for Needy Families (TANF) Decisions as of October 1997* 15-24 (The Urban Institute, 1998).

Work Participation Requirements Virtually every State now requires recipients to work to obtain benefits, although work participation requirements vary considerably. *See Building a Foundation* at 29. States have taken differing approaches as to whether a recipient's job search and educational activities satisfy work requirements. *See id.* at 31. Wyoming places recipients attending college in a separate state-funded program; New Jersey allows recipients to combine education and community service for their work activity. *Id.* Fifteen States require recipients to participate immediately in work activities, seven States require work after a short grace period, while

eighteen other States set 24 months as an outer limit, although seven of these States require participants to work as soon as they are ready. *Id.* at 29. In seven States, the date by which a recipient must participate in work activities to continue receiving benefits is set in an individualized employment plan. *Id.*

Sanctions States also impose a variety of sanctions for recipients who do not comply with work activity requirements. Sanctions differ from State to State with respect to the amount of benefit reduction and the length of the sanction. For example, with respect to the most severe sanctions, thirty-six States impose a full benefit reduction; fourteen States a partial reduction. The length of a sanction can vary from until the recipient complies, to various terms of months, to and including a recipient's lifetime. Each State which imposes a lifetime sanction also imposes a full benefit reduction. *See One Year After Federal Welfare Reform* at 29-31, 53-57.

Family Caps Twenty-two States deny increased benefits to families that have additional children while on welfare. *See Building a Foundation* at 31. Florida allows only half the increase for the first child born on welfare. *Id.* South Carolina denies increases in cash benefits but provides for additional benefits in the form of vouchers for the child's expenses or the mother's education or training expenses. *Id.*

Expanded Child Care Many States have substantially expanded the availability of child care programs. *Id.* These States have increased the availability of infant and sick child care as well as night and weekend care. *Id.* Some States have also expanded access to child care programs to the working

poor who earn in excess of the cutoff for cash assistance benefits. *Id.*

Increased Access To Transportation States recognize that a lack of transportation can prevent a person from holding a job and obtaining child care. *Id.* Louisiana now guarantees transportation where needed; Minnesota, South Carolina and Ohio exempt welfare recipients from work requirements and sanctions if transportation is unavailable. *Id.* Thirty-five States have also eased eligibility rules to allow recipients to own cars. *Id.* at 28. Virginia, Maryland, Florida, Texas and Tennessee make surplus government and donated cars available to recipients for purchase at low cost; some States provide recipients with cash for gas and repairs. *Id.* at 31.

Increased Income and Asset Eligibility Limits Thirty-five States have liberalized prior rules by allowing recipients to earn larger incomes before losing benefits. *Id.* at 28. For example, Connecticut and Indiana allow a family of three to earn up to the federal poverty line before losing benefits. *Id.* at 31. In Massachusetts and Nebraska, families subject to work requirements are allowed to keep 50 percent of their earnings. *Id.* Other States have increased the percentage of earnings which are disregarded in calculating benefits. *Id.* Thirty-six States have liberalized asset rules, allowing recipients to open individual development accounts where they can deposit funds for education, starting a business, or purchasing a home, while retaining eligibility for benefits. *See* Jack Tweedie *et al.*, *Meeting the Challenge of Welfare Reform: Programs with Promise* 5 (National Conference of State Legislatures 1998).

Diversion Programs Twenty-one States now offer lump sum payments to applicants who need help with emergency expenses (such as car repairs, back rent, utility bills) where it will help keep applicants off assistance. *See Building a Foundation* at 28. Generally, these programs provide a lump sum payment equal to three or four months of assistance; upon acceptance, the recipient loses welfare eligibility for a period. *See Meeting the Challenges of Welfare Reform* at 8. Some diversion programs also provide needy families with access to medical and child care and transportation assistance. *Id.*

Drug Law Offenders States are also in the process of developing different policies with respect to the eligibility of drug law offenders. *Id.* at 9-10. Arkansas, Florida, Georgia, Illinois and Rhode Island prohibit persons convicted of certain drug-related felonies from receiving any TANF benefits. *See* NCSL Web Site, State Welfare Reform Database.[3] Ten States currently require that drug felons participate in a treatment program to receive benefits; New Jersey and Minnesota require that drug felons submit to testing. *See id.*

As the foregoing indicates, the States have enacted a wide variety of welfare reform measures. Unlike the federally controlled system of largely uniform rules of the AFDC program in existence at the time of *Shapiro*, under which the principal difference between States was in benefit amounts and eligibility levels, there are now numerous and substantial differences between States in their approaches to dealing with recipients. Thus, unlike at the time of *Shapiro*,

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[3] The relevant NCSL web site is www.ncsl.org/statefed/welfare/welfaresearch.htm.

there are far more incentives for recipients to move to other States, whether to escape their home State's strict rules or to take advantage of another State's more favorable policies.

As Congress recognized, granting States the authority to enact durational residency rules, *see* 42 U.S.C. § 604(c), is an essential part of welfare reform to prevent shopping not only for higher benefit levels but also for more favorable program rules. *See* H.R. Conf. Rep. No. 725, 104th Cong., 2d Sess. 273 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2649, 2661; *see also* H.R. Rep. No. 651 at 1337, 1996 U.S.C.C.A.N. at 2396. Otherwise, States that have opted for higher benefit levels or more lenient program rules could be forced to abandon them. Including California, fourteen States have durational residency rules which provide that new residents receive TANF benefits at the level received in their prior State until one year has elapsed.[4] *See Building a Foundation* at 28, 33.

SUMMARY OF ARGUMENT

This Court has long recognized a "constitutional right to travel from one State to another," which "occupies a position fundamental to the concept of our Federal Union." *United States v. Guest*, 383 U.S. 745, 757 (1966). The Court has never held, however, that all laws affecting the right to travel are unconstitutional. Rather, the Constitution prohibits only those laws that penalize or unduly burden this right. If a classification does not penalize or unduly burden

[4] In addition to California, these States are: Connecticut, Georgia, Illinois, Iowa, Minnesota, New Hampshire, New York, North Dakota, Oklahoma, Pennsylvania, Rhode Island, Washington, and Wisconsin. *See Building a Foundation* at 28.

the right to travel, it is subject to rational basis review.

A. California's durational residency rule limits a new resident's monthly cash assistance to the amount paid by the State of prior residence for a period of one year. At the same time, new residents are immediately eligible for a wide range of other forms of public assistance on the same terms as other California residents. While this Court has not defined the precise parameters of what constitutes an impermissible penalty on the exercise of the right to travel, its cases demonstrate that California's treatment of new residents seeking public assistance does not penalize the right to travel. That treatment is not "sufficiently analogous to a criminal fine to justify strict scrutiny." *Maher v. Roe*, 432 U.S. 464, 474 n.8 (1977).

In *Shapiro v. Thompson*, 394 U.S. 618 (1969), the Court invalidated several state laws denying new residents AFDC benefits until they had resided in their respective States for a period of one year. The state laws in *Shapiro* flatly denied certain new residents any AFDC cash assistance beyond temporary aid. *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974), likewise involved a total denial of benefits.

Unlike the laws at issue in *Shapiro* and *Memorial Hospital*, California's rule does not impose a total denial of benefits on new residents. While the rule reduces an incentive to move, paying recipients the same level of benefits they received in their prior State does not deny them benefits they would have received had they not exercised their right to travel. When coupled with the fact that California makes numerous other benefits available to new residents

on the same terms as other California residents, its payment of the same level of TANF benefits as received in the prior State can in no sense be considered a penalty or analogous to a criminal fine.

B. Because California's rule does not penalize the right to travel, it is subject to rational basis review. The California law readily satisfies this level of constitutional scrutiny. It is rational to think that migration to avoid enforcement of program rules will jeopardize the success of welfare reform. It is also rational to think that States with greater benefit levels will become welfare magnets and will ultimately be forced to reduce benefits and programs because of limited state resources and capped federal funding under PRWORA's block grant formula. Because state residency rules like California's are rationally related to the prevention of these outcomes, and thus advance the national goal of welfare reform, they satisfy the Equal Protection Clause.

In *Shapiro* the Court stated that "the purpose of inhibiting migration by needy persons into the State is constitutionally impermisible." 394 U.S. at 629. *Shapiro* is not controlling here, however. First, Congress has expressly authorized state rules such as California's, *see* 42 U.S.C. § 604(c), and those persons likely to be affected by these rules were represented in the national political process. Second, there are numerous profound differences between the welfare system created by PRWORA and the AFDC program at issue in *Shapiro*.

Not least, Congress has broadly authorized "[a] State operating a program funded under this part [to] apply to a family the rules . . . of the program under this part of another State. . ." 42 U.S.C.

§ 604(c). As a result, States have adopted a variety of measures in reforming their welfare programs. Unlike under the AFDC program with its largely uniform rules, there are numerous incentives for recipients to migrate to other States to avoid enforcement of unfavorable rules. If the right to travel as articulated in *Shapiro* were found by this Court to prohibit a State from in any way treating new arrivals differently from longer term residents, welfare recipients could migrate to those States whose rules are more favorable to them and jeopardize benefit levels and programs there. Such an outcome would undermine the national interest in meaningful welfare reform, a goal which has been endorsed both by Congress and the States.

ARGUMENT

CALIFORNIA'S RULE LIMITING NEW RESIDENTS TO THE TANF BENEFIT LEVEL OF THEIR PRIOR STATE OF RESIDENCE FOR ONE YEAR DOES NOT PENALIZE THE RIGHT TO TRAVEL AND SATISFIES THE EQUAL PROTECTION CLAUSE

This Court has long recognized a "constitutional right to travel from one State to another," which "occupies a position fundamental to the concept of our Federal Union." *United States v. Guest*, 383 U.S. 745, 757 (1966). As Chief Justice Taney observed in *The Passenger Cases*, 48 U.S. (7 How.) 283, 492 (1849), "We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States."

The Court's cases have not adopted a *per se* rule that all laws affecting the right to travel are unconstitutional. *See Memorial Hosp. v. Maricopa County*,

415 U.S. 250, 256 (1974); *Shapiro v. Thompson*, 394 U.S. 618, 638 n. 21 (1969). As the Court explained in *Shapiro*, the scope of the right is that "all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which *unreasonably burden or restrict this movement*." 394 U.S. at 629 (emphasis added). Thus, where a classification "serves to penalize the exercise of [the] right," it is unconstitutional "unless shown to be necessary to promote a *compelling* governmental interest." *Id.* at 634. *See also Memorial Hospital*, 415 U.S. at 259.

The Court's cases, however, "have also established that only where a State's law ' "operates to *penalize* those persons . . . who have exercised their constitutional right of interstate migration" ' is heightened scrutiny triggered." *Attorney General Of New York v. Soto-Lopez*, 476 U.S. 898, 905 (1986) (emphasis added) (quoting *Memorial Hosp.*, 415 U.S. at 258 (quoting *Oregon v. Mitchell*, 400 U.S. 112, 238 (1970) (opinion of Brennan, White, and Marshall, JJ.))). Where a classification does not penalize or impose an undue burden on the right to travel, it is subject to rational basis review.[5] *See, e.g., Sosna v.*

[5] The Court has taken a similar approach in reviewing equal protection challenges to classifications affecting other fundamental rights. For example, in *Maher v. Roe*, 432 U.S. 464 (1977), the Court characterized "the central question in [the] case [as] whether the regulation 'impinges upon a fundamental right explicitly or implicitly protected by the Constitution.' " *Id.* at 471 (quoting *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973)). The Court further explained that the right at issue was not "unqualified," but rather, "protects the woman from *unduly burdensome* interference with her freedom to decide whether to terminate her pregnancy." *Id.* at 473-74 (emphasis added). *See also Bellotti v. Baird*, 428 U.S. 132, 147 (1976) (state regulation "is not unconstitutional unless it unduly burdens the right to seek an abortion").

Iowa, 419 U.S. 393, 406 (1975) (rejecting right to travel challenge to durational residency requirement for divorce; "[a]ppellant was not irretrievably foreclosed from obtaining some part of what she sought, as was the case with the welfare recipients in *Shapiro* . . . or the indigent patient in *Maricopa County*"); *Vlandis v. Kline*, 412 U.S. 441, 452-53 n.9 (1973) (citing with approval *Starns v. Malkerson*, 401 U.S. 985 (1971) (affirming one year residency rule for in-state tuition at state university)). And if such a classification is rationally related to a legitimate state interest, it is constitutional.

A. California's Rule Does Not Penalize Or Unduly Burden The Right To Travel And Is Thus Subject To Rational Basis Review

California's durational residency rule limits a new resident's monthly cash assistance under TANF to the amount paid by the State of prior residence for a period of one year. *See* Cal. Wel. & Inst. Code § 11450.03(a). Under California law, however, new residents are eligible for all other forms of public assistance, including CALWORKS programs, on the same terms as other residents. These programs include Medicaid coverage; child care; education, job training, and job placement services; cash assistance under diversion programs; transportation assistance; and food stamps. Moreover, a new resident's food stamps are increased by approximately one dollar for every three dollars that the TANF cash grant is reduced by operation of Section 11450.03(a). California's rule, which is expressly authorized by federal

law, *see* 42 U.S.C. § 604(c), does not "penalize the exercise of [the] right" to travel. *Shapiro*, 394 U.S. at 634. Nor does it unduly burden the exercise of that right.

The Court has not defined "the ultimate parameters" of what constitutes a penalty on the exercise of the right to travel. *Memorial Hospital*, 415 U.S. at 259. The Court's cases demonstrate, however, that California's classification is not of the same kind as those classifications deemed to be penalties. *See id.* at 259-60; *Shapiro*, 394 U.S. at 627. *Cf. Edwards v. California*, 314 U.S. 160 (1941) (invalidating state law criminalizing act of bringing a non-resident indigent into a State). The State's rule is not "sufficiently analogous to a criminal fine to justify strict scrutiny." *Maher v. Roe*, 432 U.S. at 474 n.8.

In *Shapiro*, the Court invalidated several state laws denying new residents AFDC benefits until they had resided in their respective States for a period of one year. *See* 394 U.S. at 622-27. These provisions, however, flatly denied certain new residents any AFDC cash assistance beyond temporary aid. As the Court explained, under the state rules at issue "the first class is granted and the second class is denied welfare aid upon which may depend the ability of the families to obtain the very means to subsist—food, shelter, and other necessities of life." *Id.* at 627. As the Court subsequently explained, "[i]n *Shapiro*, the Court found denial of the basic 'necessities of life' to be a penalty." *Memorial Hospital*, 415 U.S. at 259.[6]

[6] Respondents contend that "the denial in *Shapiro* was not in all instances total" and "that two of the three states there, Connecticut and Pennsylvania, gave 'partial assistance.'" Opp. 17-18 (quoting 394 U.S. at 635). The "partial assistance" given by Connecticut was the same amount "which all Aid to Dependent Children applicants get up to sixty days." Brief State of Connecticut at 5, *Shapiro v. Thompson*, O.T. 1967, No. 9. The assistance was available only to those "mak-[ing] a bona fide effort to get a job." *Id.* at 4-5. The plaintiff "was unable to accept gainful employment," and denied "[a]ll public assistance" for six months. Brief of Appellee at 2-3, *Shapiro v. Thompson*.

Nor did Pennsylvania grant partial assistance in the manner that California does here. With the exception of persons who came from a State which had a reciprocal agreement with Pennsylvania, new arrivals were deemed residents of their former State and were entitled only to short term grants, the number of which depended upon whether the person had a plan of self-support. *See* Pa. Pub. Assistance Manual §§ 3151-3154.32 (*reprinted in* Appendix to Br. of Appellee at 1a-5a, *Reynolds v. Smith*, O.T. 1967, No. 34). The short term grants were "for seven days or less, as needed," *id.* § 3154.31, and in no case was a person eligible for more than four grants. *See id.* §§ 3154.11; 3154.12 (*reprinted in* Appendix Br. Appellee, *Reynolds*, at 3a-4a). Application of these regulations quickly resulted in the termination of all benefits to new arrivals. *See Shapiro*, 394 U.S. at 626. It is thus more accurate to describe the assistance provided by Connecticut and Pennsylvania as temporary rather than "partial."

Memorial Hospital is to the same effect. There, the Court invalidated a state law imposing a one year residency requirement for the receipt of nonemergency medical care at government expense. *See* 415 U.S. at 259-70. Reading *Shapiro* for the proposition that "denial of the basic 'necessities of life' [is] a penalty," the Court reasoned that "[w]hatever the ultimate parameters of the *Shapiro* penalty analysis, it is at least clear that medical care is as much 'a basic necessity of life' to an indigent as welfare assistance." 415 U.S. at 259.[7]

[7] In *Dunn v. Blumstein*, 405 U.S. 330 (1972), the Court invalidated a state law imposing a one year residency require-

In *Memorial Hospital* the Court further explained that "[a]lthough any durational residence requirement imposes a potential cost on migration, . . . *Shapiro* cautioned that some 'waiting period[s] . . . may not be penalties.'" *Id.* at 258-59 (quoting 394 U.S. at 638 n.21). Indeed, in *Memorial Hospital*, the Court quoted with approval two lower court cases upholding durational residency rules for public universities, noting, *inter alia*, that such rules do not preclude a person "'from the benefit of obtaining higher education.'" 415 U.S. at 260 n.15 (citations omitted).

The following year, in *Sosna*, the Court upheld Iowa's durational residency rule for divorce, reasoning that "[a]ppellant was not irretrievably foreclosed from obtaining some part of what she sought, as was the case with the welfare recipients in *Shapiro*, the voters in *Dunn*, or the indigent patient in [*Memorial Hospital*]." *Sosna*, 419 U.S. at 406. The Court subsequently explained that its holdings in *Shapiro* and *Maricopa County* "recognized that denial of welfare to one who had recently exercised the right to travel across state lines was sufficiently analogous to a criminal fine to justify strict scrutiny." *Maher*, 432 U.S. at 474 n.8.

California's rule limiting, for one year, a workfare recipient's TANF cash benefit to the level received in a prior State is not "sufficiently analogous to a criminal fine" so as to constitute a penalty. *Id.* The rule does not impose a total denial of cash assistance as

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ment for voting. The Court subjected the provision to strict scrutiny, deeming it to be a classification which penalized persons exercising their right to travel. *See* 405 U.S. at 338-41. Of course, the statute imposed a total denial of the fundamental right to vote.

did the laws at issue in *Shapiro*. While the rule reduces an incentive to move, paying individuals the same level of benefits they received in their prior State does not deny recipients benefits they would have received had they not exercised their right to travel. In short, they are no worse off for having exercised their right to travel. And being paid the same level of benefits as received in a prior State can in no sense be considered "analogous to a criminal fine." *Id.*

That California has a higher cost of living than most States and pays substantially higher TANF benefits than some other States does not render the rule a penalty. *See* Opp. 4, 8-9 & n.5. California, after all, has no control over the legislative decisions which set the benefit levels of other States or the conditions which affect their costs of living. Indeed, if differences between various States' costs of living are constitutionally significant in penalty analysis, then the same might be said about a State's failure to adjust benefit levels to reflect the cost of living differences that frequently exist between urban and rural counties.[8]

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[8] Respondents assert that "the amount that newcomers receive would fall substantially short of what is required to subsist—or even to pay rent—in California." Opp. 9. This argument, however, ignores that newcomers still receive food stamps and that the food stamp benefit is increased by approximately $1 for every $3 in reduced TANF benefits. *See* Pet. App. 38a. Moreover, while the median monthly rent in Long Beach, California, may equal or exceed the amount of TANF cash assistance provided to respondent Roe, *see* Opp. at 8-9, there are numerous localities throughout the State where her monthly grant would cover the median cost of housing. *See Places, Towns and Townships* 327-40 (Deirdre A. Gaquin & Richard W. Dodge eds., 2d ed. 1998).

In any event, migrants to California may in some respects be better off than they were in their prior State notwithstanding the durational residency rule. As explained above, California provides to all residents a range of programs, including Medicaid coverage; child care; education, job training, and job placement services; cash assistance under diversion programs; transportation assistance; and food stamps. In addition, the rules of particular programs may be such that new residents are able to achieve a higher standard of living than they were in their prior State. For example, California has a generous earnings disregard which allows persons to disregard a substantial portion of their earned income while still retaining TANF benefits. *See* Cal. Wel. & Inst. Code § 11008.[9] While respondents have focused exclusively on the TANF program and its durational residency rule, *see* Opp. at 4, the existence of these other programs are surely relevant in answering the question of whether the State has imposed a penalty by denying new residents "the basic 'necessities of life.'" *See Memorial Hospital*, 415 U.S. at 259 (quoting *Shapiro*, 394 U.S. at 627).

Nor does California's rule impose an undue burden on the right to travel. As the Court explained in *Maher*, "there is only a semantic difference between" a claim that a state law "unduly interferes with" a fundamental right and a claim that the law "penalizes the exercise of that right." 432 U.S. at 474 n.8.

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[9] According to the Urban Institute, a California family of three with no unearned income or child care expenses can earn $1360 per month before losing eligibility for TANF benefits; the same family in Oklahoma can earn $730 per month before losing TANF benefits. *See One Year After Federal Welfare Reform* at 8-9.

Whether the analysis is formulated in terms of penalizing the right to travel or as "unreasonably burden[ing] or restrict[ing]" the exercise of the right, *Shapiro*, 394 U.S. at 629, it is clear that California's durational residency rule does not implicate strict scrutiny.

B. California's Durational Residency Rule Satisfies Rational Basis Review

Because California's rule does not penalize the right to travel, it is subject to rational basis review. The rule is entitled to the presumption of constitutionality and must be upheld if it is rationally related to legitimate governmental interests. *See Dandridge v. Williams*, 397 U.S. 471, 485-86 (1970).

In *Shapiro*, the Court stated that "the purpose of inhibiting migration by needy persons into the State is constitutionally impermissible." 394 U.S. at 629; *see also id.* at 631. This case is not controlled by *Shapiro* for two fundamental reasons.

First, recognizing the critical importance of durational residency rules for the purpose of welfare reform, Congress has expressly authorized California's rule. *See* 42 U.S.C. § 604(c). Most significantly, those persons likely to be affected by durational residency rules were represented in the national political process which enacted this legislation and which retains the power to repeal it. This case thus stands in stark contrast to *Shapiro*, where the Court held that Section 402(b) of the Social Security Act of 1935 (formerly codified at 42 U.S.C. § 602(b)), did not authorize the States' durational residency rules, *see* 394 U.S. at 639, and where new arrivals had no voice in the political process of the States which enacted the rules.

Second, the fundamental differences between the system created by the PRWORA and the AFDC program in existence at the time of *Shapiro* demonstrate why *Shapiro* is not controlling. While this case has been presented as a dispute about benefit levels, Congress more broadly authorized "[a] State operating a program funded under this part [to] apply to a family the rules . . . of the program funded under this part of another State. . . ." 42 U.S.C. § 604(c). This is of no small consequence given Congress' decision to radically restructure the welfare system and devolve to the States the authority and flexibility to experiment by creating their own rules aimed at moving welfare recipients into the work force and solving the other social problems associated with the AFDC system.

As explained above, States have adopted a variety of measures in reforming their welfare programs. There are now numerous and substantial differences between States in the manner in which they deal with recipients. Thus, unlike under the AFDC program with its largely uniform rules, there are now far more incentives for persons to migrate to other States. If the right to travel, as articulated in *Shapiro*, prohibits a State from ever treating new arrivals differently from longer term residents, welfare recipients will migrate to those States with the most favorable rules.

It is rational to think that migration to avoid the enforcement of program rules will jeopardize the success of welfare reform. It is also rational to think that States with greater benefits will become welfare magnets. *See* Paul E. Peterson & Mark C. Rom, *Welfare Magnets: A New Case for a National Standard* 79 (1990) ("A state offering high welfare benefits

will have a poverty rate 0.9 percent higher than a state providing low benefits. . . . These differences in poverty rates are most probably due to migration. . . ."); *see also* Todd Zubler, *The Right To Migrate And Welfare Reform: Time For Shapiro v. Thompson To Take A Hike*, 31 Val. U.L. Rev. 893, 933-38 (1997) (discussing empirical and anecdotal evidence supporting theory that high benefit States become welfare magnets). And it is likewise rational to think that States which become welfare magnets will ultimately be forced to reduce benefits and programs because of limited state resources and capped federal funding under PRWORA's block grant formula. *See, e.g.*, Peterson & Rom, at 55 ("[I]f benefits become too much higher than those in other states, policymakers will act to reduce them in order not to attract excessive numbers of poor people from other states."); Zubler, 31 Val. U.L. Rev. at 931-38.

That state durational residency rules such as California's reduce incentives to migrate does not render them constitutionally impermissible. While *Shapiro* states that "the purpose of inhibiting migration by needy persons into the State is constitutionally impermissible," 394 U.S. at 629, it further makes clear that a state law which implicates the right to travel is constitutionally impermissible only if it rises to the level of a penalty.[10] *See id.* at 629-31 ("If a law has '*no other purpose* . . . than to chill the assertion of constitutional rights *by penalizing* those who choose to exercise them, then it [is] patently unconstitu-

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[10] Because the state durational residency rules authorized by 42 U.S.C. § 604(c) do not rise to the level of a penalty, Congress has not authorized the States to violate the Equal Protection Clause.

tional.' ") (quoting *United States v. Jackson*, 390 U.S. 570, 581 (1968)) (emphasis added). As explained above, California's law does not impose a penalty on the right to travel.

Both the Federal Government and the States have a substantial and permissible interest in ensuring that the States have the flexibility they need to experiment with welfare reform. This interest encompasses preventing the circumvention of state program rules, protecting States from becoming welfare magnets, and also protecting recipients from reductions in benefit levels and programs. Because state durational residency rules, such as California's, are rationally related to these interests, they satisfy the Equal Protection Clause.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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